U.S. Department of Labor

Office of Administrative Law Judges
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DATE: NOVEMBER 7, 2000

CASE NO. 2000-LHC-1793

OWCP NO. 01-125129

In the Matter of:

THOMAS J. McGEE
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER-AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, (33 U.S.C. § 901, *et seq.*), herein referred to as the "Act". A hearing was held on August 21, 2000 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, CX for a Claimant's exhibit, and RX for an Employer's exhibit. At the

hearing, CX 1-7 and RX 1-14 were admitted into evidence. The parties were allowed until September 20, 2000, subsequently extended to October 4, 2000, to submit briefs. The Claimant filed a timely brief on October 4, 2000. The Employer's brief was filed on October 16, 2000 which is twelve days late. Although I have considered the arguments in Employer's brief, Employer's counsel is admonished that future late-filed pleadings will not be accepted. Appended to Claimant's brief are Claimant's W-2 forms for 1995 through 1999 and his earnings statement for 2000 which are hereby admitted into evidence. This decision is being rendered after haven given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The date of injury was August 24, 1992.
2. The injury was suffered in the course and scope of Claimant's employment with the employer.
3. At the time of the injury, an employer-employee relationship was in existence.
4. The date the Employer was informed of the injury was timely.
5. The date of the informal conference was February 10, 2000.
6. Claimant's average weekly wage at the time of the injury was $543.39.
7. The Employer has paid federal compensation benefits and Rhode Island compensation benefits of $58,588.88 and medical benefits of $17,158.53.
8. The date of maximum medical improvement was February 2, 1995.

The unresolved issues in this proceeding are:

1. Whether Claimant's settlement of his claim for worker's compensation benefits under Rhode Island law was also a settlement of his claim for benefits under the Act.
2. Whether the Employer is entitled to a credit for benefits paid pursuant to the settlement of Claimant's Rhode Island claim under Section 3 (e).
3. Whether the Employer is entitled to relief under Section 8(f). [1]

Summary of the Evidence

Thomas J. McGee ("Claimant" herein) is forty years old and a high school graduate. (TR 27-28) He was first employed by the Employer in October 1984 at their Quonset Point facility in North Kingston, Rhode Island as a sheet metal mechanic although he later transferred to the pipe shop. (TR 29) The pipe shop is responsible for the fabrication of cylinders for submarines. (TR 31) On August

[1] The Employer also raised a notice defense under Section 12 of the Act but withdrew this issue in its letter of September 4, 2000.

24, 1992, Claimant was installing pipe in the bilge tank with his legs stretched out trying to hold the pipe he was installing against the wall. After leaving the bilge tank, Claimant experienced numbness in his left leg and went to the company dispensary the following day. (TR 33-34; CX 2) Claimant consulted Dr. Michael Olin on September 10, 1992 who
referred Claimant for an MRI which showed large left lateral disc herniation L4-5, posterior disc herniation L5/S1, and mild left lateral disc bulge L3-4. (See CX 3, CX 4) Claimant was at first reluctant to undergo surgery and tried physical therapy for approximately six months. (TR 35-36; CX 3) He ultimately relented and had surgery performed by Dr. Olin. (TR 37) Claimant returned to light duty after the surgery with physical restrictions for approximately one month. (TR 37-38) He had been receiving worker's compensation benefits from the Employer for the periods of time he was off work. (TR 36, 39) Claimant was laid off by the Employer on January 6, 1995. (CX 6)

Claimant had also filed a worker's compensation claim with the state of Rhode Island which was settled in 1995. (TR 40, 56) His attorney in the state claim explained to him that he needed to file a state claim to obtain approval for surgery. (TR 57-58) The claim was settled for $40,000 of which claimant received $34,000. (TR 58; CX 5; RX 5) Claimant does not recall whether his attorney told him that the settlement covered his federal claim as well. (TR 59) The Final Decree in Claimant's Rhode Island claim states that the Respondent is discharged from all liability under the Workers' Compensation Act for the August 24, 1992 injury but makes no mention of the Longshore Act. (RX 5) Appended to the Final Decree is an unsigned General Release, however, which states that in consideration of $40,000 the Employer is released from liability under the Act for Claimant's injury. (CX 7; RX 14)

After leaving Electric Boat, Claimant was employed at Thermal Systems for two months beginning in September 1995 doing insulating work for $12.00 an hour. (TR 40-41) He was laid off and began working for BMCO in February 1996 where he installed and manufactured conveyor belt systems for the Post Office. (TR 42) He worked there for ten months and was paid $12.00 an hour. (TR 43) In early 1997, Claimant began employment with Alexander, Starr, & Kersey as a maintenance mechanic for $12.50 an hour. (TR 44) He left in September 1998 to work for ProMet Marine Services as a maintenance mechanic for $14.50 an hour. (TR 45-46) He was laid off in November 1999 and went to work for Sonesco, his present employer, as a welder for $13.00 an hour. (TR 47) Claimant's present job is operating a computer generated cutting machine which is less physically demanding than welding. (TR 48) [2]

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[2] Claimant earned $18,438.63 in regular pay and $3,372.20 in overtime pay for Sonesco through August 27, 2000. See Appendix to Claimant's brief. Claimant's W-2 forms indicate that he earned $5,319.00 for Thermal Systems Corporation in 1995, $21,115.71 for BMCO Industries, Inc. in 1996, $23,001.00 for Alexander, Starr & Kersey, Inc. in 1997 and $25,153.70 for Alexander, Starr & Kersey in 1998, $9352.56 for ProMet Marine Services Corp. in 1998 and $22,647.40 for ProMet Marine Services Corp. in 1999, and $2723.50 for Sonesco in 1999. See Id.

Claimant injured his left shoulder in a motor vehicle accident in1990 for which he received physical therapy. (TR 60-61) Claimant was off work for seven months. (TR 62) He returned to his usual job duties and has had no problems with his shoulder. (TR 62-63)

Dr. Philo F. Willetts, Jr. examined Claimant on May 10, 2000 and reviewed his medical records. (RX 11) His diagnosis was: 1) previous injury left shoulder, preexisting; 2) status post surgical treatment of herniated L4-5 disc with some residual complaints and symptoms of low back and lower extremity pain and numbness, and 3) no sign of current surgical herniation. Dr. Willetts stated that Claimant is not disabled due to his injury and that his previous shoulder injury is contributing to his condition. He assessed a 7% permanent physical impairment of Claimant's lumbar spine and he stated that half to all of his impairment could have been preexisting, but he could not state this to a reasonable medical certainty because the records of Claimant's previous injury had been destroyed. Dr. Willetts determined that Claimant's previous shoulder injury, when combined with his August 24, 1992 injury, would have made his subsequent injury materially and substantially greater.

Findings of Fact and Conclusions of Law

Section 8(i) of the Act, 33 U.S.C. § 908(i), provides:

> (1) Whenever the parties to any claim for compensation under the Act, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless
> it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless
> the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

Although there has been no Section 8(i) settlement in this case, the Employer maintains that the settlement of Claimant's Rhode Island claim arising out of the same injury settled his claim under the Act. However, the Final Decree before the Rhode Island Workers' Compensation Court does not refer to the Claimant's federal claim for benefits, and the General Release, which does purport to discharge the Employer for any liability under the Act, is neither signed nor executed. The General Release is not sufficient to be considered a settlement of Claimant's claim under the Act.

Moreover, even if the General Release were valid, the settlement of a related non-longshore action will not bar a later claim brought under the Act, unless the settlement meets the requirements of Section 8(i). In *Ryan v. Alaska Constructors*, 24 BRBS 65 (1990), the Benefits Review Board held that a settlement under the Jones Act in which claimant signed a document releasing the employer from liability for all claims under existing law was not a Section 8(i) settlement, and therefore did not terminate claimant's rights to benefits under the Longshore Act. *Ryan* at p. 70. Similarly, in *Henson v. Arcwel Corporation*, 27 BRBS 212 (1993), the Board determined that claimant's submission to the district director of a signed compromise and release for his California claim, accompanied by a letter withdrawing his claim under the Longshore Act, was not a settlement pursuant to Section 8(i). The Board found that the filing of the compromise and release and the letter of withdrawal did not constitute a Section 8(i) settlement, because the parties failed to supply the requisite supporting documentation from which a decision could be made as to the adequacy of the settlement. The Board further stated that the agreement on the form created by the State of California was not submitted in accordance with, and neither party
sought its approval under, Section 8(i). *Henson* at pp. 217-218. *See also Wilson v. Norfolk & Western Railway Company*, 32 BRBS 57, 61-62 (1998). The General Release clearly does not meet the requirements of Section 8(i).

Employer argues that the doctrines of collateral estoppel and full faith and credit bar an award in the instant case, citing *Bath Iron Works v. Director, OWCP*, 125 F. 3d 18 (1st Cir. 1997). In *Bath Iron Works*, the claimant filed a claim for workers' compensation benefits under Maine law and the Maine workers' compensation agency found that a June 1987 incident did not permanently contribute to his condition. Claimant subsequently filed a claim for compensation under the Act and the administrative law judge assigned to hear the case determined that claimant's condition was exacerbated by the June 1987 injury. The court ruled that the administrative law judge should have given collateral estoppel effect to the Maine agency determination.

However, in the instant case, the Rhode Island Worker' Compensation Court made no factual findings but merely issued a Final Decree accepting the lump sum settlement reached by the parties. An award of benefits in the instant case does not contradict any factual determinations made in the state proceeding. In a similar situation in *Dixon v. John J. McMullen and Associates*, 13 BRBS 707 (1981), the Board stated:

> ... the state commission did not adjudicate the facts in the earlier proceeding. Since the commission merely ratified the parties' mutual agreement, matters were neither actually litigated nor adjudicatively determined in proceedings before the commission. Thus the principle of collateral estoppel does not apply to the agreement rendered pursuant to such proceedings and does not bind us in the adjudication of the claim filed pursuant to the federal Act.

Dixon at pp. 715-716.

Accord Wilson, supra at p. 59. Furthermore, in *Landry v. Carlson Mooring Service*, 643 F. 2d 1081 (5th Cir. 1981), the court held that full faith and credit did not require that a settlement of claimant's claim under the Texas Workmen's Compensation Act precluded him from filing a claim under the Longshore Act. I therefore conclude that neither collateral estoppel doctrine nor full faith and credit preclude the adjudication of this claim.

For the foregoing reasons, I find that the Employer is not discharged from liability for Claimant's claim for benefits under the Act. Of course, the Employer is entitled to a credit under Section 3(e) of the Act for the $34,000 actually paid to the Claimant pursuant to the settlement of his state claim. *Lustig v. U. S. Dept. of Labor*, 881 F. 2d 593 (9th Cir. 1989).

The Employer has conceded that the Claimant is entitled to benefits for permanent partial disability under Section 8(c)(21) of the Act. (See TR, pp. 8-9) An award for permanent partial disability in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). If a claimant is unable to return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of his injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. Subsections 8(c)(21) and 8(h) require that wages earned post injury be adjusted to the wage levels which that job paid at the time of injury. *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980). The Board has held that the percentage increases in the national average weekly wage for each year should be applied to adjust the claimant's post-injury wages downward to what they were at the time of claimant's injury. *See Richardson v. General Dynamics Corporation*, 12 BRBS 327, 330-331 (1990). Claimant's earnings since leaving his employment at Electric Boat, as set forth in the appendix to Claimant's brief, must therefore be adjusted downward using the NAWW to what he would have earned at these jobs at the time of his injury. Claimant is entitled to 66 and 2/3% of the difference between the figures. *See Richardson*, n. 6.

In response to the Order Requiring Claimant's Submission issued by the court on October 19, 2000, Claimant's counsel has calculated the Claimant's loss of wage earning capacity and the applicable compensation rate for the calendar years 1995, 1996, 1997, 1998, 1999, and 2000 through August 28. Based on these calculations, I conclude that the Claimant is entitled to compensation of $15,635.22 in 1995, $6336.90 in 1996, $5541.20 in 1997, no compensation in 1998, $5470.23 in 1999, and $2895.10 in calendar year 2000 through August 28, 2000. Compensation for the period after August 28, 2000 will be calculated at the same rate as for January 1-August 28, 2000.

The Employer also raised the issue of Section 8(f). [3] Section 8(f) shifts liability for permanent partial and permanent total disability from the employer to the Special Fund after 104 weeks in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F. 2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). To obtain the benefits of Section 8(f), an employer must show that (1) the employee had a pre-existing permanent partial disability, (2) the disability was manifest to the employer prior to the subsequent injury, and (3) the claimant's current level of disability is materially and substantially greater than that which would have resulted from the injury alone. *Director, Office of Workers' Compensation Programs v. Luccitelli*, 964 F. 2d 1301 (2d Cir. 1992).

The mere fact of past injury, however, does not establish permanent partial disability; rather, there must be a serious lasting physical problem as a result of the injury. *See Lockheed Shipbuilding v. Director, OWCP*, 951 F. 2d 1143, 1145-1146, 25 BRBS 85 (CRT) (9th Cir. 1991). The administrative law judge must determine whether the employee had such a serious physical disability that a cautious employer would have been motivated to discharge (or to decline to hire) the handicapped employee because of a greatly increased risk of employment-related accident and compensation disability. *See Director, OWCP v. General Dynamics Corp.*, 982 F. 2d 790, 796-797, 26 BRBS 139 (CRT) (2nd Cir. 1992). In the present case, Claimant injured his left shoulder in an automobile accident in 1990 and was off work for seven months. However, after returning to work he was able to resume his job duties and has had no problems with his shoulder since his return. This factual pattern is similar to that in *CNA Insurance Co. v. Legrow,* 935 F. 2d 430, 436, 24 BRBS 202 (CRT)(1st Cir. 1991) where the claimant had previously injured his back on three occasions, but had returned to work after each injury and performed his job duties without medical restrictions. The court determined that the employer was not entitled to Section 8(f) relief and I reach the same result here.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations for the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

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[3] Counsel for the Employer stated at the hearing that he was raising Section 8(f) as an issue but also stated that his client may not want to plead Section 8(f). He indicated that he would get back to the undersigned whether the employer wished to plead this issue. (See TR 7) Counsel did not inform the court of Employer's position and I note that Employer's brief did not indicate that 8(f) was being raised. Out of an abundance of caution, I will rule on the 8(f) issue.

1. The Employer shall pay to the Claimant compensation for his temporary total disability from August 24, 1992 to February 1, 1995 based upon the average weekly wage of $543.39.

2. Commencing on February 2, 1995, the Employer shall pay to the Claimant compensation benefits for permanent partial disability in the amounts of $15,635.22 for 1995, $6336.90 for 1996, $5541.21 for 1997, no compensation for 1998, $5470.23 for 1999, and $2895.10 for 2000 and continuing.

3. The Employer shall receive credit for the net amounts of compensation previously paid to the Claimant as a result of the August 24, 1992 injury under Section 3(e) of the Act including the $34,000.00 in compensation paid to the Claimant pursuant to the settlement of his Rhode Island claim.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury requires, subject to the provisions of Section 7 of the Act.

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DANIEL L. LELAND
Administrative Law Judge

DLL/es/lab

Pittsburgh, PA